Filed 5/13/19 P. v. Quarker CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CARLOS IVINO QUARKER, Defendant and Appellant.	E070332 (Super.Ct.No. FWV17004798) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Knish, Judge. Reversed.

Arielle N. Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Marilyn George and Steve T. Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant and appellant, Carlos Ivino Quarker, appeals from the judgment entered following jury convictions for violating a criminal protective order involving a domestic violence proceeding (Pen. Code, § 166, subd. (c)(4)); count 2)[1] and elder abuse (§ 368, subd. (c); count 3). The jury also found true the allegation defendant committed count 2 by means of violent conduct. The jury found defendant not guilty of robbery. (§ 211; count 1.) In a bifurcated trial, the court further found that defendant had a prior strike. (§§ 667.5, subd. (b), 1170.12.) The trial court sentenced defendant to six years in prison.

While this appeal was pending, the Legislature enacted section 1001.36, effective June 27, 2018, and amended, effective January 1, 2019. (Stats. 2018, ch. 34, § 24; Stats. 2018, ch. 1005, § 1.) Section 1001.36 authorizes pretrial diversion for qualifying defendants with mental health disorders. Defendant contends section 1001.36 applies retroactively and therefore this court must reverse his conviction and remand the matter to the trial court for a hearing on whether he qualifies for mental health diversion under section 1001.36. We hold section 1001.36 applies retroactively to this case, even though defendant was already tried and convicted when section 1001.36 became effective. We therefore conditionally reverse the judgment, to allow the trial court to conduct a hearing to determine whether defendant is eligible for pretrial mental health diversion under section 1001.36.

---

[1] Unless otherwise noted, all statutory references are to the Penal Code.

II.

FACTS AND PROCEDURAL BACKGROUND

On March 15, 2017, defendant, who was 52 years old and homeless, knocked on the sliding door of his mother, G.Q.'s (Mother), home. Mother, who was 70 years old, opened the door to find out what defendant wanted. Even though Mother told him he could not come in, defendant pushed his way inside and went to the garage. Defendant told Mother he wanted to get some things. Mother followed him out to the garage and sat on a stool while defendant rummaged through the garage, looking for his belongings. Mother told defendant he had to leave. Defendant pushed Mother off the stool, causing her to land on the floor on her buttocks.

Mother got up, went inside, and called 911. She then backed her car out of the garage and parked it in the driveway, because she did not want defendant to damage her car. Defendant immediately shut the garage door. When Mother went to the front door to reenter the house, defendant opened the door, grabbed Mother's keys, and locked Mother out of her home. Mother waited outside for the police officers to arrive. When they arrived, defendant was in the garage.

Mother testified she was upset because defendant had committed similar acts numerous times, including acts of violence against Mother. Mother feared defendant. Mother was considering getting a gun. It had been about 10 years since defendant had lived in Mother's home without a restraining order.

During defendant's sentencing hearing on April 9, 2018, defense counsel noted that most of defendant's criminal history concerned altercations between defendant and

Mother. Mother would let him in her home and everything would be fine for a while. Defense counsel added that "clearly [defendant] has a mental-health issue." Defense counsel explained that defendant believed he had "a right" to Mother's home, and that belief was what caused defendant's history of legal violations and repeated violations of restraining orders and altercations with Mother. According to defense counsel, this all was the result of defendant's mental health illness and mistaken belief he had a right to Mother's home.

Defense counsel argued that incarcerating defendant was not going to resolve this problem. Defense counsel requested the court, instead, to order county mental health services for defendant or impose a low term. The court responded that it would have liked to have had more information about defendant's past mental health treatment, and would have continued the hearing for this purpose, but concluded additional information likely would not have made any difference. The court noted Mother had said defendant was diagnosed with schizophrenia and had taken medication. Defense counsel added that defendant's "rap sheet" showed he was a mentally disordered parolee in 2008.

The prosecutor stated that "we don't know whether [defendant] has schizophrenia and is treating it with methamphetamine on his own, or if his own chronic methamphetamine abuse has led to his mental-health issues. But we do know that he refuses medication, he refuses to get help for himself, and he refuses to do anything about his drug abuse." The prosecutor described defendant's previous acts of violence against Mother, and added, "[h]e refuses to follow any Court Order that prevents him from having contact with his [M]other or going to her house." The prosecutor agreed

defendant needed help, but could not force mental health treatment upon defendant. According to defendant, he had previously been offered mental health treatment at Patton State Hospital and Canyon Ridge Hospital. The prosecutor argued defendant refused to accept it.

The court imposed a six-year prison term, explaining it was based on defendant's long history of committing offenses terrorizing Mother, defendant's probation on numerous previous occasions, without any affect, and revocation of defendant's probation "scores of times." The court made the following findings: Defendant's criminal history began in 1989, with his first felony; he was convicted of numerous crimes of violence, including many section 245 offenses and stalking; and defendant had caused significant emotional damage to Mother, causing her to live in continual fear of domestic violence.

The court denied defendant probation and imposed a three-year aggravated term based on the following aggravating factors: Defendant has an extensive criminal history, including prior prison terms, probation and parole, all mostly concerning the current victim; he has a strike, involving the current victim; defendant has committed repeated criminal behavior; his behavior is dangerous to Mother, a vulnerable 70-year-old victim; the charged crime involved the threat of great bodily harm; defendant repeatedly refused to follow court orders and probation; and there is a need for defendant's

"incapacitation."[2] The court also noted mitigating factors, of defendant believing he had a right to Mother's home, although his belief was unreasonable; and defendant suffering from a mental or physical condition, although there was insufficient evidence of this factor and defendant had not attempted to get help on his own.

III.

RETROACTIVE APPLICATION OF SECTION 1001.36

Defendant contends section 1001.36, which allows pretrial mental health diversion, applies retroactively to his case. We agree.

A. *Pretrial Diversion*

Generally, pretrial diversion suspends criminal proceedings for a prescribed time period, subject to specified conditions. (§§ 1000-1000.1 [drug offense diversion]; 1001.60-1001.62 [bad check diversion]; 1001.70 [parental diversion]; 1001.80 [military diversion]; 1001.81 [repeat theft offense diversion].) Criminal charges normally are dismissed if a defendant successfully completes a diversion program. (§§ 1001.9, 1001.33, 1001.55, 1001.74-1001.75.)

Effective June 27, 2018, the Legislature enacted section 1001.36, which authorizes pretrial diversion for qualifying defendants with mental health disorders. Section 1001.36 defines "'pretrial diversion' [as] the *postponement of prosecution*, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged *until adjudication* . . . ." (§ 1001.36, subd. (c), italics added.)

[2] "[P]rotecting society from career criminals by incapacitating and isolating them with long prison terms." (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1080.)

Section 1001.36 authorizes the trial court to grant pretrial mental health diversion if the following criteria are satisfied: (1) the trial court is satisfied, based on evidence from a qualified mental health expert, that the defendant suffers from a recognized mental disorder; (2) the trial court is satisfied the defendant's disorder played a significant role in the commission of the charged offense; (3) in the opinion of a qualified mental health expert, the defendant's mental health symptoms, which motivated criminal behavior, would respond to mental health treatment; (4) the defendant consents to diversion and waives his right to a speedy trial; (5) the defendant agrees to comply with treatment for the disorder as a condition of diversion; and (6) the trial court is satisfied the defendant "will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community." (§ 1001.36, subd. (b)(1)(F).)

In addition to finding the defendant meets these six requirements, the trial court must also find that the recommended inpatient or outpatient mental health treatment program will meet the defendant's specialized mental health treatment needs. (§ 1001.36, subd. (c)(1)(A).) A defendant's criminal proceedings may be diverted no longer than two years. (§ 1001.36, subd. (c)(1)(B)(3).) If the defendant performs unsatisfactorily in diversion, including committing additional crimes, the court may reinstate criminal proceedings. (§ 1001.36, subd. (d).) If the defendant performs satisfactorily in diversion, at the end of the diversion period, the court shall dismiss the defendant's criminal charges. (§ 1001.36, subd. (e).)

B. *Prospective Application Presumption and Inference of Retroactive Intent*

The parties dispute whether section 1001.36 applies retroactively to defendant, whose appeal was pending when the statute took effect. Generally, we presume laws apply prospectively, rather than retrospectively. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 307 (*Lara*); see also *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207-1209.) Under section 3, a newly enacted Penal Code statute is presumed to operate prospectively. Section 3 provides that no part of the Penal Code "is retroactive, unless expressly so declared." (§ 3.) This statute creates a strong presumption of prospective application, codifying the principle that, "'in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the [lawmakers] . . . must have intended a retroactive application.' [Citations.] Accordingly, '"a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective."'" (*People v. Brown* (2012) 54 Cal.4th 314, 324; accord, *People v. Buycks* (2018) 5 Cal.5th 857, 880.)

"'But this presumption against retroactivity is a canon of statutory interpretation rather than a constitutional mandate. [Citation.] Therefore, the Legislature can ordinarily enact laws that apply retroactively, either explicitly or by implication. [Citation.] In order to determine if a law is meant to apply retroactively, the role of a court is to determine the intent of the Legislature . . .'" (*Lara*, *supra*, at p. 307, quoting *People v. Vela* (2017) 11 Cal.App.5th 68, 72-73.)[3]

[3] Review granted July 12, 2017, S242298 (*People v. Vela* (2017) 396 P.3d 1093), and cause transferred on February 28, 2018, to the Court of Appeal, with directions to vacate and reconsider (*People v. Vela* (2018) 411 P.3d 526).

[footnote continued on next page]

Normally, when there is no savings clause and a statute decreases punishment, it can be inferred the Legislature intended retroactive application, unless the statute states otherwise. (*In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*); *Lara*, *supra*, 4 Cal.5th at p. 307.) Such a statute decreasing punishment may thus be applied retroactively to acts committed before its passage, provided there is no final judgment of conviction. (*Estrada*, *supra*, at p. 745; *Lara*, *supra*, at p. 307.) This is referred to as the *Estrada* rule, which "rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.[4] (*People v. Conley* (2016) 63 Cal.4th at p. 657; see also *Lara*, *supra*, at p. 308; *Estrada*, *supra*, at pp. 744-745.)

The Supreme Court in *Estrada* explained that: "'A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. . . . As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts.'" (*Estrada*, *supra*, 63 Cal.2d at pp. 745-746.)

[footnote continued from previous page]
[footnote continued from previous page]

[4] The Supreme Court noted in *Lara* that "[w]e have occasionally referred to *Estrada* as reflecting a 'presumption.' [Citations.] We meant this to convey that ordinarily it is reasonable to infer for purposes of statutory construction the Legislature intended a reduction in punishment to apply retroactively." (*Lara*, *supra*, 4 Cal.5th at p. 308, fn. 5.)

In *Lara*, our high court extended the *Estrada* rule to Proposition 57, holding that the *Estrada* rule applied to defendant Lara's case, in which Lara was charged in adult court before Proposition 57 took effect. The court noted that *Estrada*, *supra*, 63 Cal.2d 740 was not directly on point because Proposition 57 does not reduce the punishment for a crime. (*Lara*, *supra*, 4 Cal.5th at pp. 303-304, 309.) However, Proposition 57 benefits juveniles by eliminating the People's ability to file criminal charges against a juvenile directly in a court of criminal jurisdiction, rather than in juvenile court, which generally treats juveniles differently, with rehabilitation as the goal. (*Lara*, *supra*, at pp. 306-307, 313.) The *Lara* court therefore concluded that *Estrada's* rationale applied. The court in *Lara* held that the *Estrada* inference of retroactivity applied, because Proposition 57 benefits juveniles who are prosecuted as adults, and Lara's judgment was not final when Proposition 57 took effect. (*Lara*, *supra*, at pp. 303-304, 309.)

Defendant argues that the *Estrada* rule applies to section 1001.36 and requires retroactive application because the statute benefits defendants who qualify for mental health diversion. But this does not end the matter. The Supreme Court in *Lara* states that the Legislature may "'choose to modify, limit, or entirely forbid the retroactive application of ameliorative criminal law amendments if it so chooses.' [Citation.] [*In re Estrada*, *supra*, 63 Cal.2d 740] 'does not govern when the statute at issue includes a "saving clause" providing that the amendment should be applied only prospectively.'" (*Lara*, *supra*, 4 Cal.5th at p. 312, quoting *People v. Conley*, *supra*, 63 Cal.4th at p. 656.) Furthermore, the absence of an express savings clause requiring prospective application is not dispositive of the Legislative intent regarding retroactivity. (*People v. DeHoyos*

(2018) 4 Cal.5th 594, 601; *People v. Conley*, *supra*, at pp. 656-657.) This court must therefore determine whether the language of section 1001.36 and the statute's legislative history refute an inference of retroactive application.

C. *Analysis*

Defendant contends that, because section 1001.36 applies retroactively under *Lara*, *supra*, 4 Cal.5th 299 and *Estrada*, *supra*, 63 Cal.2d 740, this court must reverse his judgment and remand the matter for a diversion hearing under section 1001.36. The People disagree, arguing section 1001.36 does not apply retroactively because the Legislature did not intend such application. The People reason that subdivision (c) expressly limits the application of section 1001.36 to cases which have not been adjudicated. The People argue that in all instances, including defendant's case, once a criminal proceeding has been adjudicated, postponement for diversion is no longer available under the plain language and intent of the statute. But nothing in the statutory language or legislative history of section 1001.36 clearly conveys that the Legislature intended that section 1001.36 not be applied retroactively.

In defendant's appellate reply brief, defendant relies on the recent decision of *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*),[5] in support of the proposition that

[5] The Supreme Court granted review of *Frahs*, *supra*, 27 Cal.App.5th 784 on December 27, 2018, and denied depublication of *Frahs* pending review. (*People v. Frahs* (December 27, 2018, S252220) 2018 WL 7048230.) Under California Rules of Court rule 8.1115, *Frahs* "has no binding or precedential effect, and may be cited for potentially persuasive value only." (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

section 1001.36 applies retroactively to this case. (*Frahs*, *supra*, at p. 791.) The *Frahs* court concluded that section 1001.36 applies retroactively because "the Legislature 'must have intended' that the potential 'ameliorating benefits' of mental health diversion [] 'apply to every case to which it constitutionally could apply.'" (*Frahs*, *supra*, at p. 791.) The People contend that *Frahs* was wrongly decided. We disagree.

In *Frahs*, a jury found defendant guilty on two counts of robbery. (*Frahs*, *supra*, 27 Cal.App.5th at p. 786.) While the defendant's case was pending on appeal, the Legislature enacted section 1001.36. (*Frahs*, *supra*, at p. 787.) The defendant argued on appeal that the mental health diversion program available under section 1001.36 should apply retroactively. (*Frahs*, *supra*, at p. 788.) The court in *Frahs*, agreed and conditionally reversed the defendant's conviction and sentence. (*Id*. at pp. 787, 791-793.)

Relying on the retroactivity rationale articulated in *Estrada*, *supra*, 63 Cal.2d 740, the court in *Frahs* explained that, "Applying the reasoning of the Supreme Court, we infer that the Legislature 'must have intended' that the potential 'ameliorating benefits' of mental health diversion to 'apply to every case to which it constitutionally could apply.' ([See] *Estrada*, *supra*, 63 Cal.2d at pp. 744-746.) Further, [the defendant's] case is not yet final on appeal and the record affirmatively discloses that he appears to meet at least one of the threshold requirements (a diagnosed mental disorder). Therefore, we will direct the trial court on remand to make an eligibility determination regarding diversion under section 1001.36. [¶] The Attorney General argues that: 'Subdivision (c) of the statute defines "pretrial diversion" as the "postponement [of] prosecution, either temporarily or permanently, at any point in the judicial process from the point at which

the accused is charged until adjudication." This language indicates the Legislature did not intend to extend the potential benefits of . . . section 1001.36' as broadly as possible. We disagree. *The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate.* Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara*, *supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal. [¶] Here, although [the defendant's] case has technically been 'adjudicated' in the trial court, his case is not yet final on appeal. Thus, we will instruct the trial court—as nearly as possible—to retroactively apply the provisions of section 1001.36, as though the statute existed at the time [the defendant] was initially charged." (*Frahs, supra*, 27 Cal.App.5th at p. 791, italics added.)

We agree with, and adopt, the reasoning in *Frahs*, that *Estrada*, *supra*, 63 Cal.2d 740, requires retroactive application of section 1001.36, even though subdivision (c) of section 1001.36 defines "pretrial diversion" as a postponement of prosecution at any point from the accusation through adjudication. That language is insufficient to support a determination by this court that the Legislature intended that the ameliorative benefits of section 1001.36 not apply retroactively to cases where there has been an adjudication, but the conviction was not yet final when section 1001.36 took effect. As the court in *Estrada* explained, the ameliorative benefits of a new criminal statute such as section

1001.36 should be made available to all eligible criminal defendants whose convictions are not yet final. (*Estrada*, *supra*, 63 Cal.2d at p. 745.)

The People contend that, even if section 1001.36 applies retroactively, defendant's judgment should be affirmed because defendant has not shown he would be eligible for mental health diversion under section 1001.36. We conclude, to the contrary, that remand is necessary to allow a diversion eligibility hearing under section 1001.36.

Section 1001.36 authorizes the trial court to grant pretrial mental health diversion if (1) a qualified mental health expert concludes the defendant suffers from a mental disorder, (2) the defendant's disorder played a significant role in the commission of the charged offense, (3) a qualified mental health expert concludes the defendant would respond to mental health treatment, (4) the defendant consents to diversion and waives his right to a speedy trial, (5) the defendant agrees to comply with treatment for the disorder as a condition of diversion, and (6) the defendant "will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community." (§ 1001.36, subd. (b)(1)(F).)

Remand for a diversion hearing under section 1001.36 is required here because we cannot conclude based on the record that defendant is unable to demonstrate these eligibility factors. There is evidence defendant may suffer from mental disorders and that those disorders may have played a significant role in his charged crimes. Officer DeSchepper testified defendant's mental health appeared to have deteriorated because of methamphetamine use and defendant may suffer from possible mental illness. Officer

DeSchepper further testified he heard defendant utter statements that made no sense and were illogical.

Defendant's mother testified that during a previous incident, she heard defendant make strange statements and he sounded like he was "hearing voices and talking to them." She further testified that on the date of the charged crimes, she noticed defendant was acting strangely, "throwing things and talking to himself and making noises." He accused her of not being his mother and of being an imposter. He spoke "gibberish," and said acid was falling on him from the garage ceiling. Defendant's mother told probation that defendant had been diagnosed with schizophrenia, had received medication, and needed counseling for mental illness. She believed defendant needed to be in a facility that would monitor him and ensure he takes his medication.

In addition, the probation officer reported that "defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime." The probation officer further stated that defendant has a history of mental health issues and needs an extensive residential program and supervision to ensure he remains on his prescribed medications. There is also evidence demonstrating that defendant's mental health disorders contributed to his charged offenses. Such evidence showed that defendant forced his way into his mother's home and assaulted her under the delusion that he owned his mother's home.

While this court declines to make factual determinations as to whether defendant has sufficiently demonstrated any of the eligibility factors for mental health diversion under section 1001.36, we conclude there is sufficient evidence in the record to support

remanding this matter for the trial court to conduct an eligibility hearing under section 1001.36. We are aware that defendant might not qualify because he has a criminal history that suggests he may pose an unreasonable risk of danger to public safety, particularly to his mother. However, we are unable to discern whether that risk may be ameliorated by defendant receiving effective treatment. It is thus inappropriate for this court to speculate as to whether the trial court will find defendant eligible for mental health diversion. Remand is therefore necessary because we cannot say as, a matter of law, based on the record, that defendant would not be able to establish eligibility for mental health diversion under section 1001.36.

IV.

DISPOSITION

The judgment is conditionally reversed, and the matter is remanded to the trial court with directions to conduct a diversion eligibility hearing under section 1001.36 within 90 days from the remittitur. If the trial court determines that defendant is eligible for diversion, the court should grant diversion and, if the defendant successfully completes diversion, defendant's charges should be dismissed. If, however, the trial court concludes that defendant is not eligible for diversion or defendant fails to complete diversion, his conviction and sentence shall be reinstated.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
Acting P. J.

We concur:

FIELDS
J.

RAPHAEL
J.